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No. [illegible]

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G. J. LUCCHESE, ET AL.,

Petitioners,

vs.

GUS B. MAUERMANN

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT SAN ANTONIO, TEXAS, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 814

G. J. LUCCHESE, ET AL.,

Petitioners,

vs.

GUS B. MAUERMANN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT SAN ANTONIO, TEXAS.

To the Supreme Court of the United States and the Honorable Judges Thereof:

The Petitioners, G. J. Lucchese, H. H. Theis, and E. H. Maddox, respectfully petition this Honorable Court for a Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, for the reasons hereinafter set out.

The brief in support of this petition begins at Page 15.

I

Judgment Below

The judgment sought to be reviewed became final on September 25, 1946, and appears at Page 48 of the record.

II

Statement of the Matter Involved

This is a suit instituted by Petitioners in one of the District Courts of Bexar County, Texas, to contest a $5,700,000.00 bond election. There are no controverted issues of fact in the points presented. On July 26, 1945, the City of San Antonio, a Home Rule City, annexed the adjacent areas of Terrell Hills and Olmos Park, and provided that from and after July 26, 1945, these two areas shall be a part of, and subject to the jurisdiction, ordinances, and taxes of, the City of San Antonio (R. 26, 10, 13). The Charter of the City of San Antonio provided that the City shall have power, by ordinance, to annex adjacent territory and that the inhabitants of annexed territory shall be entitled to all the rights and privileges of all other citizens of the City of San Antonio (R. 26, 28; Exhibit 26, Page 4, Par. 2).

On September 25, 1945, the City of San Antonio held a special bond election upon twenty-two separate propositions to borrow money on the credit of the City of San Antonio, and to issue the bonds of said city and to levy taxes for the payment of the interest and provide a sinking fund for the redemption of such bonds at maturity (R. 25, 38-9). Seventeen of the propositions voted upon at the election were defeated (R. 39). The highest majority received by any one of the remaining five bond propositions voted on in said election was 878, and the lowest majority 30 (R. 39).

Petitioners were qualified electors who owned taxable property in the City of San Antonio which will be subject to the additional tax sought to be imposed by the election of September 25, 1945 (R. 19, 28).

Petitioners conclusively established in the trial court that at least 933 qualified electors resided in the annexed

areas of Terrell Hills and Olmos Park just prior to and on September 25, 1945 (R. 21, 22, 29-31), and that these electors were, as a class, denied the right to vote in said election (R. 36, 37, 22). The Court of Civil Appeals found that there were "enough qualified voters living in these territories (Terrell Hills and Olmos Park) to have changed the result of the election" (R. 39). This class of disfranchised electors exceeded the majority received by any one of the several bond issue propositions voted on in said election (R. 39).

Respondent conceded in the trial court that the annexed areas were in fact part of the City of San Antonio (R. 34, 33, 16), but refused to permit the electors residing therein to vote because they had not resided within the limits of the City of San Antonio for six months preceding the date of the election (R. 35-36). This contention was based upon Sections 2 and 3 of Article 6 of the Constitution of the State of Texas, which require a qualified elector in a municipal bond election to have resided in the State for one year and within the corporate limits of the City for six months next preceding the election. Each of the 933 disfranchised electors had resided in the State for one year and in the annexed area for more than six months preceding September 25, 1945 (R. 21, 22, 39).

If the bonds are issued, the taxes of the property owning electors residing in the annexed towns of Terrell Hills and Almos Park will be increased (R. 34, 35).

It was Petitioners' contention in the trial court that all of the qualified electors who had resided in the State for one year and in the annexed areas for six months, immediately preceding September 25, 1945, were entitled to vote in the election, since, in determining the residential qualifications of electors, the law considers the period of time they had resided in the annexed areas (R. 3-9); and that the dis-

franchisement of this class of qualified electors was in contravention of the Fourteenth Amendment and resulted in depriving Petitioners of their property without due process of law (R. 8).

The trial court sustained Respondent's contention, and held that the electors residing in the annexed areas were properly not permitted to vote because they had not actually resided within the corporate limits of the City of San Antonio for six months preceding the election (R. 24), and rendered judgment against Petitioners (R. 17-18).

There was no question or issue raised by Respondent, either in the trial court or in the Court of Civil Appeals, as to the validity of the annexation of the towns of Terrell Hills and Olmos Park (R. 16). On the contrary, Respondent, who was the Mayor of the City of San Antonio (R. 19, 28), testified that municipal services were being furnished to, and accepted by, the annexed areas (R. 34), and, "we are asserting in this Court that they (Terrell Hills and Olmos Park) are a part of the city" (R. 34).

Terrell Hills and Olmos Park instituted identical suits contesting the right of the City of San Antonio to annex said towns (R. 20, 21, 39, 71). Respondent and the City of San Antonio were defendants in said suits (R. 39, 72). Petitioners were not parties to these two suits.

Subsequent to the perfection of Petitioners' appeal to the Court of Civil Appeals (R. 18, 31), the two annexation cases were heard in the trial court, and identical judgments were there rendered enjoining the City of San Antonio from asserting authority over the former towns of Terrell Hills and Olmos Park (R. 39, 71, 74). Appeals were perfected by Respondent and the City of San Antonio in each of these annexation cases to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, where they were numbered and styled as follows: No. 11,619, *City of San Antonio* v. *State, ex Rel., Town of Almos Park;* and No.

11,620, *City of San Antonio* v. *State, ex Rel., Town of Terrell Hills* (R. 39, 71-2), and consolidated (R. 71).

Petitioners will hereafter refer to said annexation suits by the number they bore in the Court of Civil Appeals—No. 11,619 and No. 11,620; and to this bond election suit by No. 11,612—the number it bore in the same court.

Cause No. 11,612 (the election contest) was submitted and argued in the Court of Civil Appeals on March 27, 1946. On March 30, 1946, while the Court of Civil Appeals had Cause No. 11,612 under consideration, and before Causes No. 11,619 and No. 11,620 had been submitted, briefed or argued, Respondent and the City of San Antonio filed in Causes No. 11,619 and No. 11,620, identical documents denominated "Appellants' Motion to Affirm Judgment," in which Motions Respondent and the City of San Antonio stipulated and agreed that the annexation ordinances of July 26, 1945, were null and void, and that the judgments rendered by the Trial Court in Causes No. 11,619 and No. 11,620, were correct and should be affirmed, and also reformed so as to declare the annexation ordinances "void" (R. 56, 59). The Appellees in said Causes No. 11,619 and No. 11,620 joined in said Motions (R. 58, 60, 72). Petitioners contend that these Motions were void and collusive as a matter of law.

Upon the filing of said Motions to Affirm Judgment, Petitioners' attorneys moved the Court of Civil Appeals to grant them leave to file an *Amicus Curiae* Reply to said Motions To Affirm Judgment, and in said Reply questioned the motives and good faith of Respondent in filing said motions, and suggested to the Court that it should not permit the parties to Causes No. 11,619 and No. 11,620 to stipulate that an ordinance was unconstitutional, and should not grant said Motions to Affirm Judgment, for the reason that the City of San Antonio was a public body and the questions involved in said causes were of public interest;

that persons not parties to the record were interested in, and will be affected by, the litigation, and that Respondent should not be permitted to abandon or confess away the rights of the public without a judicial determination of the validity of the annexation ordinances; and consequently, said causes should be disposed of by the Court of Civil Appeals on their merits, and not by stipulations which had the purpose and effect of attempting to barter away the rights of the citizens of San Antonio and to perpetuate an erroneous judgment and to prevent the Court of Civil Appeals from passing on the merits of the legal issues as made (R. 61-70). Petitioners' Motion for leave to file an *Amicus Curiae* Reply to said Motions to Affirm Judgment was denied.

On April 10, 1946, the Court of Civil Appeals granted said Motions to Affirm Judgment, and reformed the judgment of the trial court so as to declare the ordinances of July 26, 1945, annexing the former towns of Terrell Hills and Olmos Park to be "void". In the course of its opinion in said causes, the Court of Civil Appeals stated that it follows the practice of granting Motions which are agreed to by the parties to a suit, and concluded:

> "*We are not here called upon to decide whether or not the judgments involved are impervious to any possible attack that might be lodged against them.* Appellants, by filing the Motions which they did file, have waived the right to present assignments or points of error. *These* cases (No. 11,619 and No. 11,620) *are before us without specific specifications of error.* To the contrary, Appellants state that the judgments of the trial court are correct" (R. 71-75).

On the same date, April 10, 1946, the Court of Civil Appeals, in Cause No. 11,612 (the election contest), affirmed the judgment of the trial court, and in the face of its finding that there were enough qualified voters living in the

annexed territory to have changed the result of the election, overruled Petitioners' contention that the bond election of September 25, 1945, was void by reason of the disfranchisement of the qualified electors residing in the annexed areas, and held that since the parties to Causes No. 11,619 and No. 11,620 had agreed and stipulated that the ordinances annexing the former Towns of Terrell Hills and Olmos Park were "null and void", and since the Court of Civil Appeals had entered judgment in said causes in conformity with the stipulations and agreements of the parties in said causes (R. 38-9) and,

> "As there are now upon the minutes of this Court a judgment decreeing the ordinances which attempted to annex the cities of Olmos Park and Terrell Hills to be null and void, we hold that the voters residing in such territory were properly not permitted to vote in a bond issue election in the City of San Antonio. No. 11,619, City of San Antonio *v.* State, ex rel. Town of Olmos Park; No. 11,620, City of San Antonio *v.* State, ex rel. Town of Terrell Hills" (R. 38-9).

The action of the Court of Civil Appeals, after finding that there were "enough qualified voters living in these territories to have changed the result of the election", in holding that the voters residing in the annexed territory were properly not permitted to vote in the bond election because of the agreed judgments entered in Causes No. 11,619 and No. 11,620, ascribed to these void judgments the binding force and effect of *res judicata,* and deprived Petitioners of the due process of law guaranteed by the Fourteenth Amendment. *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 38 S. Ct. 566, 247 U. S. 464; *Hansberry* v. *Lee,* 61 S. Ct. 115, 116, 117, 311 U. S. 32; *Kersh Lake Drainage Dist.* v. *Johnson,* 60 S. Ct. 640, 643, 309 U. S. 485; *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 50 S. Ct. 451, 453, 281 U. S. 673.

Since Petitioners were not parties to Causes No. 11,619 and No. 11,620, they were not in the position to show that the annexation ordinances were in all things valid, and that the Statutes authorized the annexations (See Appendix, P. 32). Petitioners were precluded from having the invalidity of the election determined on the basis of the disfranchisement of qualified electors as a class; on the contrary the issue was foreclosed by the Appellate Court ascribing *res adjudicata* effect to an *agreed judgment* between third parties (to which Petitioners were not parties) that the annexation ordinances were void; bonds will be issued and Petitioners' property will be burdened with taxes to pay the principal and interest of bonds issued pursuant to a void election,—and the invalidity of which election the Appellate Court steadfastly refused to allow Petitioners to demonstrate, but binding them by the *agreed judgment* of third parties that the annexation ordinances were void—and since *"void by agreed judgment"* the areas were never lawfully annexed—and since not lawfully annexed the disfranchisement as a class of the qualified electors therein residing was harmless.

The Court of Civil Appeals could not assume that Petitioners had no defense against the judgment rendered in Causes No. 11,619 and No. 11,620. *Rees* v. *City of Watertown*, 19 Wall. 107, 123, 22 L. Ed. 72, 77; *Coe* v. *Armour Fertilizer Works*, 35 S. Ct. 625, 629, 237 U. S. 413.

Petitioners applied to the Supreme Court of Texas for a Writ of Error, which was denied by said Court, without opinion, with the notation "Refused. No Reversible Error" (R. 77-89). Petitioners' Motion for Rehearing in said Court was overruled on September 25, 1946 (R. 89, 96). All remedies in the State Courts have been exhausted. Under the law of Texas, the effect of the order of the Supreme Court of Texas refusing Petitioners' Application for Writ of Error is to make the judgment of the Court of Civil Ap-

peals final. Texas Rules of Civil Procedure, Rule 483, as amended February 1, 1946. (See Appendix, P. 32).

The Court of Civil Appeals thus became, in this case, the highest Court of the State in which a decision could be had. See, *Bacon* v. *State of Texas,* 163 U. S. 207, 16 S. Ct. 1023.

The opinion of the Court of Civil Appeals in Causes No. 11,619 and No. 11,620 appears in 195 S. W. (2) 421; and the opinion in the instant case appears in 195 S. W. (2) 422.

The federal matters involved in this case are:

(1) Whether a state court may permit third parties to a suit to stipulate that a certain ordinance is void, and enter judgment based on such stipulation without having judicially determined that such ordinance is in fact void, and thereafter ascribe to such a judgment the binding force and effect of *res judicata* and conclusive of the rights of Petitioners even though they were not parties to said suit or stipulation; *Postal Teleg. Cable Co.* v. *City of Newport, Ky.,* 38 S. Ct. 566, 247 U. S. 464; *Hansberry* v. *Lee,* 61 S. Ct. 115, 116, 117, 311 U. S. 32; *Kersh Lake Drainage Dist.* v. *Johnson,* 60 S. Ct. 640, 643, 309 U. S. 485; *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 50 S. Ct. 451, 281 U. S. 673; *Kelley* v. *Town of Milan,* 8 S. Ct. 1101, 1111, 127 U. S. 139; *Lawrence Mfg. Co.* v. *Janesville Cotton Mills,* 11 S. Ct. 402, 138 U. S. 552; *Chicago & G. T. Ry. Co.* v. *Wellman,* 12 S. Ct. 400, 402; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 37 S. Ct. 287, 289, 243 U. S. 281, 289.

(2). Whether a state court may base its decision on a point not presented or argued by the Respondent, and which Petitioners had never had or been accorded an opportunity to meet by the production of law or evidence. *Le Tulle* v. *Scofield,* 60 S. Ct. 313, 308 U. S. 415; *Lutcher & Moore Lumber Co.* v. *Knight,* 30 S. Ct. 505, 509, 217 U. S. 257; *Postal*

Telegraph Cable Co. v. *City of Newport, Ky.*, 38 S. Ct. 566, 570, 247 U. S. 464.

III

Statement of the Basis of the Jurisdiction of This Court

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Judicial Code, Sec. 237(b), as amended by the act of February 13, 1925, 28 U. S. C. A. Sec. 344(b), 43 Stat. 937, reading in part:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination,—any cause wherein a final judgment or decree has been rendered or passed by the highest Court of a State in which a decision could be had—where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution—of the United States;"

The Federal Constitutional issues were properly preserved. The judgment of the Court below became final on September 25, 1946 (R. 48, 96) and this petition is filed within three months thereafter.

IV

The Questions Presented

The questions presented to this Court are:

> (1). May an Appellate Court render a judgment in one case that a municipal ordinance is void, without a judicial determination to that effect, but based solely on a stipulation by the parties to that suit, and thereafter make said stipulation and agreed judgment binding upon, and *res adjudicata* of, the rights of third parties in another suit who were not parties to the stipulation?

(2). Whether the Court of Civil Appeals, by its adjudication that Petitioners are bound by a judgment rendered in an earlier litigation to which they were not parties, and which earlier judgment was based upon a void stipulation of the parties as to the invalidity of an ordinance, has deprived Petitioners of the due process of law guaranteed by the Fourteenth Amendment.

(3). Whether Petitioners have been deprived of the due process of law guaranteed by the Fourteenth Amendment by the action of the Court of Civil Appeals in deciding the case on a point not presented or argued by Respondent, either in the Trial Court or Court of Civil Appeals, and which Petitioners had never had or been accorded an opportunity to meet by the production of law or evidence.

(4). May a city annex adjacent territory and thereafter refuse to permit the qualified electors, residing therein for more than six months, to vote in a special election which will impose taxes on their property, because these electors had not lived within the original city limits for six months preceding the election?

The first, second, and third questions, being predicated on the action of the Court of Civil Appeals, were urged in that Court in Petitioners' Motion for Rehearing (R. 49-76), which was overruled by the Court of Civil Appeals (R. 49).

The fourth question was raised in the District Court of Bexar County (R. 3-9), which was overruled (R. 24). This point was reurged in the Court of Civil Appeals by Points of Error 1 and 8 in the brief filed in that Court (R. 37-8), and reurged in said Court in a motion for rehearing (R. 49-50) which was overruled (R. 49).

Petitioners then filed in the Supreme Court of Texas an application for Writ of Error, again raising each of the

questions (R. 77-88), which was "refused" (R. 89). Each of the issues was again raised in the Supreme Court of Texas by a Motion For Rehearing (R. 89-95), which was overruled on September 25, 1946 (R. 96).

V

Reasons Relied upon for Allowance of the Writ of Certiorari

A substantial federal question presents itself with respect to the right of a State Court to hold the Petitioners bound by a private stipulation of parties to another lawsuit that a certain ordinance was void. This Court has held that when the judgment of a State Court, ascribing to the judgment of another Court the binding force and effect of *res judicata,* is challenged for want of due process, it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 38 S. Ct. 566, 247 U. S. 464; *Hansberry* v. *Lee,* 61 S. Ct. 115, 116, 117, 311 U. S. 32; *Kersh Lake Drainage Dist.* v. *Johnson,* 60 S. Ct. 640, 643, 309 U. S. 485; *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 50 S. Ct. 451, 281 U. S. 673. This salutary principle becomes basic when the first judgment is based not upon a judicial determination of the State Court, but upon a private stipulation of the parties. In such case, there has been no judicial determination or submission of the question to the Court for a decision on its merits, but merely a consent, in advance, to a particular decision; and such judgment cannot be set up as a judicial determination of the invalidity of the annexation ordinances. *Kelley* v. *Town of Milan,* 8 S. Ct. 1101, 1111, 127

U. S. 139; *Lawrence Mfg. Co.* v. *Janesville Cotton Mills,* 11 S. Ct. 402, 138 U. S. 552; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 37 S. Ct. 287, 289, 243 U. S. 281, 289; *Chicago & G. T. Ry. Co.* v. *Wellman,* 12 S. Ct. 400, 402

The decision of the Court of Civil Appeals that the qualified electors residing in the annexed areas were properly not permitted to vote in the election was based upon a point not presented, relied upon, argued or urged by Respondent; and which Petitioners had never had or been accorded an opportunity to meet by the production of law or evidence. On the contrary, Respondent contended in the Trial Court and in the Court of Civil Appeals that the annexation ordinances were valid, and that the annexed areas were part of the City of San Antonio. Such a procedure also fails to accord Petitioners due process of law. *Le Tulle* v. *Scofield,* 60 S. Ct. 313, 308 U. S. 415. The action of the Court of Civil Appeals in this respect was substantially to deny the Petitioners their day in Court—they were condemned without affording them an opportunity to be heard. *Lutcher & Moore Lumber Co.* v. *Knight,* 30 S. Ct. 505, 509, 217 U. S. 257. The principle underlying all administration of justice is that no proceedings shall take place in Court affecting the rights of anyone without affording him an opportunity to be heard. *Postal Teleg. Cable Co.* v. *City of Newport, Ky.,* 38 S. Ct. 566, 570, 247 U. S. 464; *Railroad Commission of Calif.* v. *Pacific Gas Electric Co.,* 58 S. Ct. 334, 338, 302 U. S. 388.

The Court of Civil Appeals could not assume that Petitioners had no defense against the agreed judgment rendered in Causes No. 11,619 and No. 11,620. "To assume that he (Petitioners) has none, and therefore, that he is entitled to no day in Court, is to assume against him the very point he may wish to contest." *Rees v. City of Watertown,* 19 Wall. 107, 123, 22 L. Ed. 72, 77. "To one who protests against the taking of his property without due process of

law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees *v.* Watertown, 19 Wall. 107, 123, 22 L. Ed. 72, 77." *Coe* v. *Armour Fertilizer Works,* 35 S. Ct. 625, 629, 237 U. S. 413.

The action of the Court of Civil Appeals is not in accord, and conflicts, with applicable decisions of this Court on the federal questions of substance raised by Petitioners.

In the accompanying brief, the issues supporting Petitioners' claims and contentions are more fully stated and considered and said brief is referred to in aid thereof.

WHEREFORE, Petitioners pray that in the exercise of its discretion, this Court issue its Writ of Certiorari to review the decision herein of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, and for such other orders as may be appropriate; that the said judgment of the Court of Civil Appeals be reversed, and your Petitioners have such other and further relief in the premises as to this Court may seem just and proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 814

G. J. LUCCHESE, ET AL.,

Petitioners,

vs.

GUS B. MAUERMANN,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion Below

The Supreme Court of Texas did not write an opinion in this cause. The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas is reported in 195 S. W. (2) 422. The opinion is also printed in full in the record (R. 38).

II

Grounds of Jurisdiction

The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 344 (b), 43 Stat. 937.

The judgment of the Court of Civil Appeals, herein sought to be reviewed, became final on September 25, 1946 (R. 48, 96).

As more particularly set out in the foregoing petition for certiorari, the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas (the highest Court of the State in which a decision could be had) involved substantial Federal questions:

(1). Whether the Court of Civil Appeals, by its adjudication that Petitioners in this case are bound by the void stipulation of parties to another lawsuit as to the invalidity of an ordinance, has deprived them of the due process of law guaranteed by the Fourteenth Amendment. *Postal Teleg. Cable Co.* v. *City of Newport, Ky.*, 38 S. Ct. 566, 570, 247 U. S. 464; *Hansberry* v. *Lee*, 61 S. Ct. 115, 116, 117, 311 U. S. 32; *Kersh Lake Drainage Dist.* v. *Johnson*, 60 S. Ct. 640, 643, 309 U. S. 485; *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill*, 50 S. Ct. 451, 281 U. S. 673.

(2). Whether the action of the Court of Civil Appeals in basing its decision on a point not presented or argued by the Respondent either in the Trial Court or Court of Civil Appeals, and which Petitioners had never had an opportunity to meet by the production of law or evidence, has deprived Petitioners of the due process of law guaranteed by the Fourteenth Amendment. *Le Tulle* v. *Scofield*, 60 S. Ct. 313; *Lutcher & Moore Lumber Co.* v. *Knight*, 30 S. Ct. 505, 509; *Postal Teleg. Cable Co.* v. *City of Newport, Ky.*, 38 S. Ct. 566, 570, 247 U. S. 464.

(3). Whether the Court of Civil Appeals had the power, authority, or jurisdiction to bind Petitioners by a void stipulation of parties to another lawsuit that a municipal ordinance was void. *Kelley* v. *Town of Milan*, 8 S. Ct. 1101, 1111, 127 U. S. 139; *Lawrence Mfg. Co.* v. *Janesville Cot-*

ton Mills, 11 S. Ct. 402, 138 U. S. 552; *Chicago & G. T. Ry. Co.* v. *Wellman,* 12 S. Ct. 400, 402; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 37 S. Ct. 287, 289, 243 U. S. 281, 289.

The Court of Civil Appeals was in this case, the State Court of last resort. *Bacon* v. *State of Texas,* 163 U. S. 207, 16 S. Ct. 1023.

III

Statement of the Case

The essential facts of the case are fully stated in the accompanying petition for certiorari (P. 2), and, in the interest of brevity, said statement is adopted hereunder and made a part of this brief.

IV

Specification of Errors

1

The Court of Civil Appeals erred in holding that the stipulations and agreements of the parties in Cause No. 11,619, styled City of San Antonio *v.* State, ex rel. Town of Olmos Park, and No. 11,620, styled City of San Antonio *v.* State, ex rel. Town of Terrell Hills, as to the unconstitutionality of the annexation ordinances, were binding upon Petitioners, and consequently, the voters residing in the annexed territory were properly not permitted to vote in the bond issue election held in the City of San Antonio on September 25, 1945. Parties to litigation cannot agree upon the unconstitutionality of an ordinance, and the Court of Civil Appeals had no authority to accept and act upon such an agreement. To uphold such agreements would permit litigants to privately nullify any valid enactment of a legislative body.

2

The Court of Civil Appeals erred in rendering judgment in said Causes No. 11,619 and No. 11,620, based upon the agreements and stipulations of the parties as to the unconstitutionality of the annexation ordinances, and thereafter make said agreed judgment binding upon Petitioners, without first having judicially inquired into and determined that the law as agreed to between the parties was, in fact, the law of the State of Texas. It was beyond the power of Respondent and the officials of the City of San Antonio, by stipulation, to divest the City of a right which it had under its Charter and the Constitution and Statutes to annex territory by ordinance; and it was error for the Court of Civil Appeals not to disregard said stipulations and agreements. Petitioners were entitled to have their judicial rights determined by the laws of the land based upon judicial determinations, and not by a judgment based upon agreements and stipulations of parties to other lawsuits.

3

The Court of Civil Appeals erred in holding in the instant case that by reason of its judgment in Causes No. 11,619 and No. 11,620, the voters residing in the annexed areas "were properly not permitted to vote in the bond issue election in the City of San Antonio." The right of exercising the elective franchise was given to the citizens residing in the annexed areas by the Constitution and Statutes of the State of Texas—which right could not be taken away from them by a void judgment predicated on agreements and stipulations by parties to another lawsuit as to a Constitutional question. The action of the Court of Civil Appeals deprived Petitioners of their property and deprived the citizens of the annexed areas of the right

to vote in the bond election, in denial of the due process of law guaranteed by the Fourteenth Amendment.

4

The Court of Civil Appeals erred in basing its decision that the voters residing in the annexed areas were properly not permitted to vote in the election on a point not presented, urged or argued by Respondent, and which the Petitioners had never had an opportunity to meet by the production of law or evidence.

5

The Court of Civil Appeals erred in affirming the judgment of the District Court because the record conclusively shows that Respondent and the City of San Antonio disfranchised an entire class of qualified voters, which in number exceeded the highest majority received by any one of the bond propositions voted upon in the election, and thereby deprived Petitioners of their property without due process of law and imposed debts and burdens upon their property without due process of law, in violation of, and contrary to, the Fourteenth Amendment.

V

ARGUMENT

1

The Election Was Void

As stated by the Court of Civil Appeals, there were enough qualified voters living in the annexed territory to have changed the result of the election (R. 37). Since these qualified voters were disfranchised as a class (R. 36, 37, 22), this finding would make the election of September 25, 1945, void as a matter of law, but for the action of the Court of

Civil Appeals in binding Petitioners by the void proceedings in Causes No. 11,619 and No. 11,620 (R. 38-9, 48). *Ex Parte Kennedy*, 3 S. W. 114, Tex.; *Marsden* v. *Troy*, 189 S. W. 960, Tex.; *McCrary On Elections*, 4th Ed. Sec. 235, P. 176-177, Sec. 276, P. 208; 18 Am. Jur. Sec. 259, P. 350, Sec. 265, P. 354; 29 C. J. S. Sec. 211, P. 306; 16 Tex. Jur. Sec. 131, P. 17.

The finding and opinion of the Court of Civil Appeals that there were "enough qualified voters living in these territories to have changed the result of the election" is supported by the record and the law. The Trial Court found that there were at least 933 qualified electors residing in the annexed areas just prior to September 25, 1945 (R. 21, 22). And it is universally held that in determining the political qualifications of the residents of annexed territory, the law gives such residents the benefit of the period of time they had resided in the annexed area, for the reason that such citizens had done no act by which they should lose any of their political rights. *Gibson* v. *Wood*, 49 S. W. 768, Ky.; *Renner* v. *Bennett*, 21 Ohio St. 431; *Scott* v. *McColeman*, 107 N. W. 869, Mich.; *Meffert* v. *Brown*, 116 S. W. 779, Ky.; *McCrary On Elections*, Sec. 47, P. 37; *McCarthy* v. *Fitzgerald*, 32 N. W. 788; *Smith* v. *Patterson*, 242 S. W. 749, 750, Tex.

2

The Action of the Court of Civil Appeals in Binding Petitioners by the Void Proceedings in Causes No. 11,619 and No. 11,620 Was Void.

As stated by the Court of Civil Appeals there were enough qualified voters living in the annexed territory to have changed the result of the election; but notwithstanding such fact, the Court of Civil Appeals failed and refused to make a judicial determination on the question

of the validity of the election. The Court of Civil Appeals summarily, and without any warrant in law, abandoned its judicial function, and held that since the parties to the appeals in Causes No. 11,619 and No. 11,620 had agreed and stipulated to the entry of a judgment in the Court of Civil Appeals "so as to expressly decree the attempted ordinances of annexation null and void," said agreement and stipulation was binding upon Petitioners, and consequently the voters residing in the annexed territory were properly not permitted to vote.

While an Appellate Court may, perhaps, take judicial notice of, and ascertain the law as embodied in, one of its previous decisions and make application of such law in the determination of a case under consideration, this right, we most urgently submit, can only be exercised when the Court has previously in fact *judicially determined and judicially declared* the status of the law of the case it seeks to use as precedent. In the absence of a judicial declaration of the law by the Court of Civil Appeals in Causes No. 11,619 and No. 11,620, the opinion and judgment of the Court of Civil Appeals in said causes is not a conclusive, authoritative or binding appellate court decision; it did not declare the law of the case; it was not a judicial determination by the Court of the status of the law; it was not binding upon itself or upon any inferior court in any subsequent litigation involving the annexation ordinances; it did not become a part of the law of the State, and it is no authority on the question of the validity or invalidity of the annexation ordinances.

Whether or not the annexation ordinances were valid and constitutional was a question of law, and the parties to Causes No. 11,619 and No. 11,620 had no legal right to agree and stipulate that said ordinances were void and unconstitutional; and neither did the Court of Civil Appeals have the power, authority, or jurisdiction to accept and act upon

said agreement and stipulation without an independent examination of the record and the law, and a judicial determination of said question. Especially, when the Court of Civil Appeals was informed that the subject matter of the stipulation, and a decision based thereon, would necessarily affect the substantial interests of the general public and of third persons not parties to said causes.

Petitioners submit that the judgment in causes No. 11,619 and No. 11,620 was the unauthorized and void act of the respondent and Commissioners of the City of San Antonio, and not the judicial act of the Court of Civil Appeals. The City of San Antonio is not bound by such void judgment, for it cannot be shorn and stripped of its governmental and legislative powers and functions by such a proceeding; and neither were Petitioners bound by such proceedings.

In *Kelley* v. *Town of Milan*, 127 U. S. 139, 8 S. Ct. 1101, 1111, the Mayor and Aldermen of Milan, a municipal corporation in Tennessee, had instituted suit against the Mississippi Ry. Co. to enjoin the collection of certain bonds issued by the town of Milan. At the trial, the Mayor and Aldermen stipulated that the bonds were valid, and a judgment was entered accordingly. In a subsequent suit by a third party involving the subject matter, this judgment was interposed as a defense. The Court, in holding the stipulation and the judgment based thereon to be ineffective, said:

> "This was no adjudication by the Court of the validity of the bonds, on the submission to it, as a judicial tribunal, of the question of such validity. The declaration of the validity of the bonds, contained in the decree, was made solely in pursuance of the consent to that effect contained in the agreement signed by the mayor of the town and the officer of the New Orleans, St. Louis & Chicago Railroad Company. * * * The adjudication in the decree cannot, under the circumstances, be set up as a *judicial determination* of the

validity of the bonds. Russell *v.* Place, 94 U. S. 606; Insurance Co. *v.* Broughton, 109 U. S. 121, 125, 3 Sup. Ct. Rep. 99. *This was not the case of a submission to the Court of a question for its decision on the merits, but it was a consent, in advance, to a particular decision,* by a person who had no right to bind the town by such a consent."

To the same effect see: *Chicago Grand Trunk Ry. Co.* v. *Wellman,* 12 S. Ct. 400, 402, 143 U. S. 339; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 37 S. Ct. 287, 243 U. S. 281; *Case* v. *Los Angeles Lumber Co.,* 60 S. Ct. 1, 6, 308 U. S. 106; *Sanfords Estate* v. *Commissioner of Internal Revenue,* 60 S. Ct. 51, 59, 308 U. S. 39.

In *City of St. Paul* v. *Chicago St. P. M. & O. Ry. Co.,* 166 N. W. 335, Sup. Ct. Minn., litigation arose between the City of St. Paul and certain railroads as to who had the duty of repairing a certain bridge. While the litigation was pending, the City Council passed an ordinance for the purpose of settling the litigation, and provided that "The corporation attorney is hereby authorized and directed to stipulate for, and procure the entry of, final judgment to the effect that no duty rests upon either or any of said railway companies to maintain or keep in repair the bridge described in said proceedings * * *." In compliance with this ordinance, the City Attorney entered into a stipulation with the Defendant railroads which called for a judgment against the City. In a subsequent suit over the same subject matter, the Defendant relied on the agreed judgment theretofore entered in conformity with the stipulations. The Court held that stipulations affecting "public interests" are not binding upon the Court, and since the judgment was entered "*without findings of any kind,*" but entered pursuant to a stipulation of the officers of the City, it "*was not rendered as the judicial act of a Court,*" and "*the judgment as well as the stipulation is void;*" citing *Kelley* v. *Milan,*

127 U. S. 139, 8 Sup. Ct. 1101, 32 L. E. 77; *Bank* v. *Commissioners,* 119 N. C. 214, 226, 25 S. E. 966; *Lawrence Mfg. Co.* v. *Janesville Cotton Mills,* 138 U. S. 552, 11 Sup. Ct. 402, 34 L. Ed. 1005.

In a previous case, involving the same stipulation, *State ex rel. City of St. Paul* v. *Great Northern Ry. Co.,* 158 N. W. 972, 975, the Court held:

> "*This judgment was the act of the parties, not the act of the Court;* and whatever effect such a judgment might have upon the personal rights of parties thereto who possessed the power to make such an agreement, neither the State nor the governmental agencies of the State can be shorn of their governmental powers by any such device."

The annexation ordinances were not the private property of the Respondent and Commissioners of the City of San Antonio, to be confessed and bartered away whenever it became politically expedient for them to do so.

In *National Bank of Colchester* v. *Murphy,* 50 N. E. (2) 748, 749, Sup. Ct. Ill., the Court said:

> "This case involves important public questions. *In such cases the parties may not stipulate away the rights of the public.* No valid stipulation or agreement, as to questions of law or the legal effect of facts, can be made by the parties. *People ex rel. Reinhart* v. *Herrin,* 284 Ill. 368, 120 N. E. 274, 276. In that case it was said: '*It is the duty of the Court to determine whether a law is constitutional or not. Courts cannot declare legislative acts unconstitutional on an agreed statement of facts.* Chicago Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176. Neither can they stipulate the legal effect of admitted facts. Swift and Co. *v.* Hocking Valley Ry. Co., 243 U. S. 281, 37 S. Ct. 287, 61 L. E. 722. *A public law is not the property of any Court and cannot be confessed away.*" Citing cases.

And in *State ex rel. McCuffery* v. *Aloe*, 54 S. W. 494, 495, Mo., it was held:

> "*A public law is not the property of any man, and cannot be confessed away.* When the judiciary undertakes to pass judgment on an act of the legislature in the light of the Constitution, it exercises the highest function of government known under our free institutions. In such cases parties and counsel may aid the Court in its search for truth, both as to facts and law, *but the responsibility for its findings and conclusions is upon the Court alone.* * * * *A judgment of invalidity of a statute could not be predicated on an admission.* * * *"

Petitioners submit that the stipulations of the parties in Causes No. 11,619 and No. 11,620, did not relieve the Court of Civil Appeals of its judicial function of determining whether the annexation ordinances were constitutional. The public interest that a result be reached in public matters which promotes a well-ordered society is foremost in every suit in which the public is, in effect, a party. Such public interest is entrusted to the Court's consideration and protection, as well as those public officials seeking to confess error in a matter in which the public is vitally concerned. The proper administration of law cannot be left merely to the stipulation of the parties in public matters, since such parties might, and often do, disregard, or are in error as to, the rights of the public. See in this connection, *Young* v. *United States*, 62 S. Ct. 510, 315 U. S. 257. Manifestly, to uphold an agreement that an act is unconstitutional would permit litigants to deliberately nullify any valid enactment of a legislative body. *State* v. *Thomason*, 221 S. W. 491, 495, Tenn.; *Humard Const. Co.* v. *City of Middlesboro*, 36 S. W. (2) 38, 40, Ky.

The following additional authorities are cited in support of our contention that parties to a suit may not stipulate

that an ordinance or statute is void or unconstitutional: *State, ex rel., Sullivan* v. *Schnitger,* 95 Pac. 698, 701, Wyoming; *Atty. General* v. *Rice,* 31 N. W. 203, 206, Mich.; *State Consol. Pub. Co.* v. *Hill,* 4 Pac. (2) 668, 669, Arizona; *In Re Fahnestocks Estate,* 50 N. E. (2) 733, 735, Ill.; *North Platte Lodge* v. *Bd. of Equalization,* 252 N. W. 313, 92 A. L. R. 658, Neb.; 11 Am. Jur. Sec. 127, P. 775; 37 Am. Jur. Sec. 169, P. 799; 3 Am. Jur. Sec. 819, P. 361; 50 Am. Jur. Sec. 4, P. 607.

3

The Action of the Court of Civil Appeals Deprived Petitioners of the Due Process of Law Guaranteed by the Fourteenth Amendment.

We submit that the action of the Court of Civil Appeals in binding Petitioners by the void judgment entered in Causes No. 11,619 and No. 11,620, is contrary to due process of law. Petitioners were not parties to said suits; though they sought to be heard therein through *Amicus Curiae* proceedings, they were denied that right; though they attempted to let the Court of Civil Appeals know that the Respondent and Commissioners of the City of San Antonio had no right to confess away the interests of the City of San Antonio, they were denied the right to speak; though they importuned the Court of Civil Appeals to pass on the merits of Causes No. 11,619 and No. 11,620 and sought to file a brief to assist the Court, they were ignored. Yet, the Petitioners were condemned by the Court of Civil Appeals. The action of the Court of Civil Appeals in this cause wants all the attributes of a judicial determination and cannot be upheld.

"Due process of law requires a judicial determination of the issues." 16 C. J. S. Sec. 616, P. 1241. But this record discloses that the Court of Civil Appeals expressly held in Causes No. 11,619 and No. 11,620, that it was not

judicially determining that the annexation ordinances were void, but was entering a judgment based upon the agreements and stipulations of the parties (R. 56, 59, 71, 74, 75). Petitioners were not parties to said causes, and Respondent at no time contended in this cause that the annexation ordinances were void, but on the contrary at all times contended that the annexation of Olmos Park and Terrell Hills was valid (R. 34).

By reason of the void stipulation and agreement of the parties in causes No. 11,619 and No. 11,620, and the entry of the void judgment based on said stipulation, the Court of Civil Appeals failed and refused to pass upon Petitioners' contention that the election was void because of the disfranchisement of the qualified electors residing in the former towns of Terrell Hills and Olmos Park.

In *Postal Telegraph Cable Co.* v. *City of Newport, Ky.*, 38 S. Ct. 566, 247 U. S. 464, the State Court, as in the instant case, declined to pass on the issues raised by the Petitioner, deeming that Petitioner was concluded upon the issues by the consent of other parties to a prior suit (Page 569 of opinion). The Court held, Page 570, that:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern Pacific R. R. *v.* United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; Greenl. Ev. §§ 522, 523. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor *v.* McVeigh, 93 U. S. 274, 277, 23 L. Ed. 914; Louisville & Nashville R. R. Co. *v.* Schmidt, 177 U. S. 230, 236, 20 Sup. Ct. 620, 44 L. Ed. 747; Simon *v.* Craft, 182 U. S. 427, 436, 21 Sup. Ct. 836, 45 L. Ed. 1165. And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in

> the proceedings without a hearing or an opportunity to be heard (Pennoyer *v.* Neff, 95 U. S. 714, 733, 24 L. Ed. 565; Scott *v.* McNeal, 154 U. S. 34, 46, 14 Sup. Ct. 1108, 38 L. Ed. 896; Coe *v.* Armour Fertilizer Works, 237 U. S. 413, 423, 35 Sup. Ct. 625, 59 L. Ed. 1027), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein."

The action of the Court of Civil Apeals in binding Petitioners by the void judgments entered in Causes No. 11,619 and No. 11,620, has deprived them of the due process of law guaranteed by the Fourteenth Amendment. "The right to be heard in the Appellate Court is as valuable and as fundamental to an aggrieved party as is the right to be heard in the Trial Court." *Burrage* v. *Hunt Production Co.,* 114 S. W. (2) 1228, 1235, Pars. 13, 14.

In *Hansberry* v. *Lee,* 61 S. Ct. 115, 116, 117, 311 U. S. 32, Mr. Justice Stone stated, "The question is whether the Supreme of Illinois, by its adjudication that Petitioners in this case are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the Fourteenth Amendment." And, in answering this question, held:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded

> such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Life Indemnity Co. *v.* Rupp, 235 U. S. 261, 273, 35 S. Ct. 37, 40, 59 L. Ed. 220."

And in *Truax* v. *Corrigan*, 42 S. Ct. 124, 129, 257 U. S. 312, it was held:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

Petitioners' Motion For Rehearing in the Court of Civil Appeals (R. 49-76) raised the fundamental issue that the action of the Court of Civil Appeals in binding Petitioners by the void action of said Court in Causes No. 11,619 and No. 11,620 transgressed the due process clause of the Fourteenth Amendment. This federal claim was timely made and was raised at the first opportunity. The Supreme Court of Texas refused Petitioners' Application For Writ of Error, without opinion or hearing (R. 89). Petitioners submit that in this regard they have been denied "due process of law"—an opportunity to be heard and to defend their substantive rights. The effect of the judgment of the Court of Civil Appeals is to deprive Petitioners of property without affording them at any time an opportunity to be heard in their defense. They asserted an invasion of their substantive right under the Federal Constitution,—to due process of law. If the judgment of the Court of Civil Appeals is permitted to stand, deprivation of Petitioners' property is accomplished without their ever having an opportunity to defend against the void proceedings and judgment entered in Causes No. 11,619 and No. 11,620.

The judiciary is not immune from transgression of the due process clause of the Fourteenth Amendment. The Federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. While the Courts of the State of Texas have the power to interpret and declare the written and unwritten laws of the State, Petitioners must be accorded due process in the primary sense —an opportunity to present their case and be heard in their support. While it is the right and duty of the Courts of the State of Texas to determine the adjective as well as the substantive law of the State of Texas, they must, in so doing, accord Petitioners due process of law. *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 50 S. Ct. 451, 281 U. S. 673.

As stated in 16 *C. J. S.*, Sec. 622, P. 1265:

> "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement, and this doctrine applies to every Court and to all kinds of judicial proceedings."

Further, the decision of the Court of Civil Appeals that the voters residing in Olmos Park and Terrell Hills were properly not permitted to vote in the bond issue election in the City of San Antonio, was based on a point not presented, relied upon, or urged by Respondent; and which the Petitioners had never had or been accorded an opportunity to meet by the production of evidence or law. Such a procedure also fails to accord Petitioners due process of law. *Le Tulle* v. *Schofield,* 60 S. Ct. 313, 308 U. S. 415. The action of the Court of Civil Appeals in this regard was substantially to deny to the Petitioners their day in Court—they were condemned without affording them an opportunity to be heard. *Lutcher & Moore Lumber Co.* v. *Knight,* 30 S. Ct. 505, 217 U. S. 257. The principle underlying all administra-

tion of justice is that no proceedings shall take place in court affecting the rights of anyone without affording him an opportunity to be heard.

Conclusion

The judgment of the Court of Civil Appeals is fundamentally wrong, is in conflict with decisions of this Court, and is in disregard of the requirement of due process.

WHEREFORE, Petitioners pray that in the exercise of its Discretion, this Court issue its Writ of Certiorari to review the decision herein of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, and for such other orders as may be appropriate; that the said judgment of the Court of Civil Appeals be reversed, and your Petitioners have such other and further relief in the premises as to this Court may seem just and proper.

Respectfully submitted,

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Attorney for Petitioners.

A. R. SOHN,
San Antonio 5, Texas,
Of Counsel.

APPENDIX

From Vernon's Texas Revised Civil Statutes of 1925:

"Art. 1175. Enumerated Powers.

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

* * * * * * *

(2). The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, according to such rules as may be provided by said charter."

From Texas Rules of Civil Procedure:

"Rule 483. Order on Application for Writ of Eror.

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects had correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of jurisdiction.'"

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Supreme Court of the United States

OCTOBER TERM, 1946

No. 814

G. J. LUCCHESE, et al, Petitioners,

versus

GUS B. MAUERMANN, Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF.

TO THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE JUDGES THEREOF:

Petitioners again reiterate that the material and controlling facts are undisputed. In our petition for writ of certiorari and brief in support thereof, we have conscientiously endeavored to accurately and fully state the undisputed facts in the record.

On page 2 of respondent's brief, it is admitted that the number of the disfranchised class of voters contended for by petitioners was in fact 933, but it is stated there was no evidence or finding that any of said persons actually resided in the annexed areas on September 25, 1945, or were otherwise qualified to vote in the election of September 25, 1945.

Respondent ignores the finding of the Court of Civil Appeals that there were in fact **"enough qualified** voters living in these territories (Olmos Park and Terrell Hills) to have changed the result of the election" (R. 39). Since the highest majority received by any one of the bond issue propositions was 878 (R. 39), it is apparent that Petitioners established to the satisfaction of the Court of Civil Appeals that more than 878 qualified voters actually resided in the annexed areas on September 25, 1945. The detailed manner in which the extent of the class of disfranchised electors was established in the trial court does not appear in the Transcript of Record on file herein. In view of the above finding of the Court of Civil Appeals, it was not deemed necessary to include in the Record the large amount of evidence establishing these facts.

Respondent further challenges the following as untrue statements and not supported by the record:

> (1). That respondent conceded in the trial court that the annexed areas were in fact part of the City of San Antonio (Page 2, of respondent's brief).

(2). That the 933 citizens were, as a class, denied the right to vote in the election (Page 3 of respondent's brief).

With reference to No. (1), the record discloses that respondent testified as follows:

> Q. Do you know of any other action by the City of San Antonio, do you have knowledge of any other action by the City of San Antonio that the City is relying upon to accomplish annexation other than Exhibits 3 and 4?
>
> A. We are relying on the laws of the State of Texas, the statutes and the laws and ordinances in compliance with those (R. 33).
>
> Q. That is correct but the question is do you have knowledge of any specific official action taken by the City to accomplish annexation, other than these ordinances?
>
> A. Well, there is a lawsuit pending and we are defending the lawsuit, **we are asserting in this Court that they are a part of the City** (R. 34).
>
> Q. It is the position of the City of San Antonio, is it not, that the territory embraced and described in these ordinances, being Exhibits 3 and 4, **are a part of the City of San Antonio?**
>
> A. **Yes, sir.**
>
> Q. I believe the City has extended certain services to the territories described in these ordinances?
>
> A. We are offering any services we have, yes (R. 34).

And with reference to No. (2), the record discloses that respondent testified as follows:

> Q. Now, Mr. Mayor, with reference to the voters who reside in the area known as Terrell Hills and Olmos Park, **were those people permitted to vote?**
>
> A. **They were not** (R. 36).

REPLY TO RESPONDENT'S FIRST POINT.

Respondent contends that petitioners improperly referred to the judgments of the Court of Civil Appeals in Causes No. 11,619 and No. 11,620, as "agreed judgments", and that in view of the action of the City of San Antonio and respondent in said causes, "no action could be taken by the Court of Civil Appeals other than to affirm the judgment of the trial court" (Pages 3-4), and that the action of the respondent in Causes No. 11,619 and No. 11,620 should be considered in the same light as if he had failed to file a brief in the Court of Civil Appeals, or if he had filed a brief and had failed to show sound reasoning for setting the judgments of the trial court aside (Page 7).

Petitioners submit that, as shown in their main brief, page 5, the parties to Causes No. 11,619 and No. 11,620 in fact stipulated and agreed that the annexation ordinances were null and void, and that the Court of Civil Appeals should enter judgment declaring these ordinances to be void; and that the Court of Civil Appeals, after being advised that the questions involved in said causes were of public in-

terest and that persons not parties to the record were interested in, and will be affected by, the litigation, failed and refused to make a judicial determination on the question of the validity of the annexation ordinances. But, if it should be assumed that the parties did not in fact agree and stipulate that the annexation ordinances were null and void, and that respondent merely confessed error in his contentions in the trial court, such confession did not relieve the Court of Civil Appeals of its duty of judicially determining whether the annexation ordinances were void.

As stated by this Court in Young v. United States, 315 U. S. 257, 62 S. Ct. 510:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. See Pearlton v. United States, 64 App. D. C. 169, 75 F. 2d 772. The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the crim-

> inal law cannot be left merely to the stipulation of parties. Cf. Rex v. Wilkes, 4 Burr, 2527, 2551, 98 Eng. Rep. 327; State v. Green, 167 Wash. 266, 9 P. 2d 62."

As shown in petitioners' main brief, the principle enunciated in Young v. United States has been followed in civil proceedings.

This point has been annotated in 132 A. L. R. 1185, 1186, and there the writer concludes from the many authorities cited:

> "The proposition that an appellate court may retain an appeal for hearing and determination if it involves questions of public interest even though it has become moot so far as the parties or the particular action are concerned or though the parties desire that it be dismissed, is supported, either directly or by implication, by the great weight of authority."

This principle has been sustained in: United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 17 S. Ct. 540; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 S. Ct. 279; Boise City Irrig. & Land Co. v. Clark, 131 F. 415 (C. C. A. 9th).

REPLY TO PETITIONER'S SECOND POINT.

Respondent now contends that the annexation ordinances were in fact void. As we have heretofore shown, no such contention was raised in this

cause in the trial court or Court of Civil Appeals. The Court of Civil Appeals refused to permit petitioners' attorneys to file an Amicus Curiae brief in Causes No. 11,619 and No. 11,620 to demonstrate to the Court that the annexation proceedings were in all things valid and in accord with the Constitution, Statutes and authoritative decisions of the State (R. 69).

Whether the annexation ordinances are valid is not an issue in this case, and the Court of Civil Appeals made no judicial determination on that question. But if it is, then petitioners had the right to have such issue tried out in the Court of Civil Appeals. Petitioners importuned the Court of Civil Appeals to judicially determine that issue, without avail (R. 63-69). Petitioners contend that on a proper trial of that issue they can demonstrate that the Constitution and Statutes of Texas confers on every Home Rule City the plenary power of the Legislature to fix its boundaries, with power to annex by ordinance any adjacent municipality of less than five thousand inhabitants. City of Pelly v. Harris County Water Control & Imp. Dist., decided by the Supreme Court of Texas on Nov. 27, 1946, and **not yet officially reported, reversing the Court of Civil Appeals** which held that a Home Rule City could not extend its boundaries to take in new territory which was already incorporated under legislative and constitutional sanctions. The Court of Civil Appeals case so reversed is re-

ported in 195 S. W. (2) 241. Washington Heights Independent School District v. City of Fort Worth, 251 S. W. 341, Tex.; Nexsen v. Board of Supr's of Elizabeth City, 128 S. E. 570; City of Houston v. City of Magnolia Park, 276 S. W. 685, Tex.; Turner v. City of Beaumont, 197 S. W. (2) 114, Tex.; City of Oak Cliff v. State, 77 S. W. 24, 26, Aff. 79 S. W. 1, 4, Tex.; Steinhagen v. Eastham, 233 S. W. 660, aff. 243 S. W. 457; Cohen v. City of Houston, 205 S. W. 707; Allen v. City of Austin, 116 S. W. (2) 468, Tex.; City of Wichita Falls v. Bowen, 182 S. W. (2) 695, 697, Tex.; Hunt v. Atkinson, 12 S .W. (2) 142, Tex.; City of Fort Worth v. State ex rel. Ridglia Village, 186 S. W. (2) 323, Tex. Petitioners did not have the opportunity to establish: that the annexed areas were completely surrounded by, and enclosed within, the corporate limits of the City of San Antonio; that said areas had no public debt, fire department, water supply department, electrical department, gas department, health, sewerage disposal or sanitation department; and that it was indispensable for the discharge of the obligations and purposes of the corporate existence of the City of San Antonio, and for the protection of the public health, safety and general welfare of the citizens of San Antonio that the adjacent towns of Terrell Hills and Olmos Park be annexed to the City of San Antonio. City of Pelly v. Harris County Water Control and Imp. Dist., Supreme Court, unreported, supra; Town of Griffing Park v. City of Port Arthur, 36 S. W. (2) 593, 595, Par. 5.

Respondent **assumes** that petitioners had no defense against the judgments rendered in Causes No. 11,619 and No. 11,620. As stated in Coe v. Armour Fertilizer Works, 35 S. Ct. 625, 629, 237 U. S. 413:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123, 22 L. Ed. 72, 77."

REPLY TO RESPONDENT'S THIRD POINT.

Respondent contends that he had the right and authority to confess error and abandon the appeal in Causes No. 11,619 and No. 11,620. This point has been fully answered in the petition for writ of certiorari and brief in support thereof, Pages 20-26. Even though respondent was of the opinion that the trial court had reached the correct result in those cases, such confession did not relieve the Court of Civil Appeals of the performance of the judicial function, and the Court should have determined the questions independently of the confessions.

On Page 11, respondent states that the judgments in Causes No. 11,619 and No. 11,620 imposed no burden on petitioners. In their attempt to file an Amicus Curiae reply in said causes, petitioners showed to the Court of Civil Appeals that if the annexation ordinances are valid, then all of the tax paying citizens of the City of San Antonio have the right to have all of the tax paying citizens of Olmos Park and Terrell Hills assume and bear their part of the cost of government of the City of San Antonio, and that respondent should not be permitted to

abandon or confess away such right without a judicial determination of the question of the vilidity of the annexation ordinances (R. 66). Further, the record discloses that petitioners' property will be burdened with taxes to pay the principal and interest of bonds issued pursuant to a void election (R. 19, 28).

REPLY TO RESPONDENT'S FOURTH POINT.

We have heretofore shown that the Court of Civil Appeals found that there were enough qualified voters residing in the annexed areas on September 25, 1945, to have changed the result of the election. And it is undisputed that all of these qualified voters were, as a class, denied the right to vote in the election of September 25, 1945.

CONCLUSION.

WHEREFORE, petitioners pray as in their petion for writ of certiorari, and brief in support thereof.

Respectfully Submitted,

By.....

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

G. J. LUCCHESE, ET AL.,
Petitioners,

vs.

GUS B. MAUERMANN,
Respondent

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners, in their brief, adopt as the statement of the case the statement contained in the petition for certiorari denominated "Statement of the Matter Involved." This statement begins by saying that there are no controverted issues of fact in the points presented, but the statement as made by petitioners contains so many over-statements, loose generalities and points of misplaced emphasis that it does not contain a true statment of the facts involved.

In the first paragraph, petitioners assert that the City of San Antonio "annexed the adjacent areas of Terrell Hills and Olmos Park." A little farther on, it is stated that "petitioners conclusively established in the trial court that at least 933 qualified electors resided in the annexed areas of Terrell Hills

and Olmos Park just prior to and on September 25, 1945." And it is further stated that "respondent conceded in the trial court that the annexed areas were in fact part of the City of San Antonio." These statements are not true.

The trial court found that the City of San Antonio "attempted" to annex the territory constituting the cities of Terrell Hills and Olmos Park. (Findings No. 11-15, R. 20-21) The findings of the trial court further show that at the time of such attempted annexation, both Terrell Hills and Olmos Park were duly incorporated cities or towns of less than 5,000 inhabitants; that each had a duly elected, qualified and acting Mayor; that neither had ever in any way consented to be annexed to the City of San Antonio, but that they had at all times resisted said attempted annexation and had brought legal proceedings to declare said annexation ordinances invalid, which legal proceedings were pending at the time of the election herein contested and at the time of the trial of this election contest. (Findings 12-16, R. 20-21) These findings by the trial court are sufficient to show that the attempted annexation of these two incorporated towns was in fact void.

The findings of the trial court further showed that these two incorported towns which were attempted to be annexed by the City of San Antonio constituted Bexar County voting precincts Nos. 170 and 176 (Findings 13-17, R. 21-22). The trial court found that a total of 933 persons in said two election precincts had either voted in the election of November, 1944, upon exemption or had paid their poll taxes and were on the Bexar County Tax Collector's list of poll tax payers and were also upon either the property assessment rolls for the State and County, or upon the City assessment rolls, or both, but the Court further found "there was no actual evidence that any of said persons actually resided in said precincts on September 25, 1945, or were at that time

otherwise qualified to vote in such precinct in said election." (Findings 14-18, R. 21-22)

The findings of the trial court are that while no election officers were appointed for holding elections in such precincts in the September 25, 1945, bond election, but that there was no evidence of any request on the part of the voters living in such precincts that such election be held and no evidence that any one offered to, or would have voted in such election in said precincts, or that any one was denied the right to vote therein. (Finding 19, R. 22)

In the statement, and throughout petitioners' brief, the judgments of the Court of Civil Appeals in Causes No. 11,-619 and No. 11,620, are referred to as "agreed judgments," and it is charged that the decision of the Court of Civil Appeals in such cases was based upon stipulations of the parties to said suits, and that they did not constitute a judicial determination of the matters involved, and that these judgments were obtained by collusion between the appellants and the appellees in said suits.

These statements are not supported by the record. The Court of Civil Appeals causes numbers 11,619 and 11,620 were quo warranto suits brought in the name of the State of Texas for the purpose of testing the validity of the ordinances by which the City of San Antonio attempted to annex the town of Olmos Park and the town of Terrell Hills. These suits were regularly tried in the district court, all issues being fully contested, and the judgment of the district court was adverse to the City of San Antonio. The City of San Antonio had the right to appeal, though it was under no compulsion to do so, and it elected to exercise this right. The Court of Civil Appeals had jurisdiction to review only the proceedings of the trial court upon specific assignments of error to be set up by the appellant, City of San Antonio.

In the absence of such specific assignments or points of

error, no action could be taken by the Court of Civil Appeals other than to affirm the judgment of the trial court. Instead of filing assignments of error, the City of San Antonio, through its counsel, admitted in the Court of Civil Appeals, by its motion to affirm judgment, that the final judgment entered by the trial court was correct. There was no agreement or stipulation whatsoever concerning this matter, and it is upon this admission that the affirmance of the judgments of the trial court in these two cases is based by the Court of Civil Appeals. In addition, the City of San Antonio requested that the wording of the judgment as entered by the trial court be amended so as to use the specific languge that the ordinance in each case "was and is null and void and of no valid force or effect." Counsel for the two towns involved agreed and consented in writing that the judgments entered by the trial court in the two cases might be so modified. (R. 58 and 60) There was no other stipulation involved in the proceedings. The Court of Civil Appeals was of the opinion that the proposed amendment of the wording of the judgments in no manner changed the legal effect of said judgments. (Motions to Reform and Affirm. R. pp 56, 58, 59 & 61) This is apparent from the following brief quotation from the opinion:

> "It would be difficult to select more suitable or stringent language to accomplish the purpose of rendering the two annexation ordinances wholly nugatory than that employed by the trial court in these cases.
>
> "We are therefore of the opinion that a conclusion that the ordinances were and are wholly void is necessarily implied from the provisions of the judgments. No theory within the frame work of the pleading other than that of the voidness of the annexation ordinances will support the decrees rendered. Consequently, we see no valid objection to here stating explicitly a conclusion which is necessarily implied by the judgments rendered in the trial court." (R. 72-73)

CONTENTIONS OF PETITIONERS

That petitioners, in their brief state five separate specifications of error, but they all relate to substantially the same matters of fact and points of law and are argued jointly by petitioners in their brief. These points may be summarized as follows:

(a) That the Court of Civil Appeals, in its judgment and opinion, in causes Nos. 11,619 and 11,620, held that the stipulations and agreements of the parties to said two suits were binding upon petitioners who were not parties to said suits.

(b) That the Court of Civil Appeals in said causes Nos. 11,619 and 11,620, based its judgment upon agreements and stipulations of the parties to said suits as to the unconstitutionality of the annexation ordinances.

(c) That the Court of Civil Appeals, in the present suit, held that the voters residing in the annexed areas involved in the quo warranto suits, causes Nos. 11,619 and 11,620, in the Court of Civil Appeals, were properly not permitted to vote in the bond issue election in the City of San Antonio because of a void judgment in said causes Nos. 11,619 and 11,620, predicated on agreements and stipulations by the parties to said other suits as to a constitutional question.

(d) That it was beyond the power of the respondent and the officials of the City of San Antonio to enter into such stipulation and agreement and that the Court of Civil Appeals was in error in not regarding the same.

(e) That the foregoing action of the Court of Civil Appeals was erroneous and deprived petitioners of their property in denial of due process of law as guaranteed by the Fourteenth Amendment.

CONTENTIONS OF RESPONDENT

Respondent contends as follows:

(a) That the Court of Civil Appeals did not hold that the stipulations of the parties in Causes Nos. 11,619 and 11,620 were binding on petitioners and did not base its judgment on any such stipulations.

(b) That said ordinances which attempted to annex Olmos Park and Terrell Hills were in fact void. That this was apparent from the evidence and the findings of the trial court in this case and such void ordinances were subject to collateral attack.

(c) That the City of San Antonio, through its officers and attorneys, had the right and authority to confess error and abandon its appeal in said quo warranto suits (Nos. 11,619 and 11,620).

(d) The validity of the election of September 25, 1945, was properly upheld regardless of whether or not the annexation ordinances were void.

POINTS AND AUTHORITIES

I.

The Court of Civil Appeals did not hold that the stipulations of the parties in causes Nos. 11,619 *and* 11,620 *were binding on petitioners and did not base its judgment on any such stipulations.*

The elaborate statement of purported facts contained in petitioners specifications of error and elsewhere in their brief conceal rather than reveal the true state of the record with reference to the judgments entered in the two quo warranto suits by the Court of Civil Appeals (Nos. 11,619 and 11,620.) These quo warranto suits were fully litigated in the trial

court and judgment was rendered holding the two annexation proceedings invalid and permanently enjoining the City of San Antonio from attempting to exercise any authority over the territory attempted to be annexed. (R. 71) The City appealed from these judgments. The Court of Civil Appeals found that "the judgments rendered by the trial court seem entirely appropriate to the type of suit and subject matter involved. Said judgments are supported by the pleadings and *are free from fundamental error.*" It then became necessary for the City to attack said judgments by specific assignments or points of error, if it could do so. Otherwise, the Court of Civil Appeals could do nothing but affirm the judgments. The City apparently finding itself unable to produce sound assignments of error attacking said judgments, filed its motion in each case admitting that the final judgment entered by the trial court was correct, and asking for the affirmance of said judgments without further delay. The same result would have been reached if the City had failed to file a brief in the Court of Civil Appeals, or if it had filed a brief and had failed to show sound reasoning for setting the judgments of the trial court aside.

The only effect of filing the motion for affirmance apparently was in the time in which the judgment of the Court of Civil Appeals was rendered. The motion on behalf of the City to affirm was not a stipulation or an agreement with the opposite parties. The City further requested a reformation of the wording of the judgment by the inclusion of the express words declaring said ordinances void. The appellees in said suits endorsed on said motion their agreement and consent that the wording of the final judgment entered by the trial court might be modified by including express words declaring the ordinances involved to be void.

The Court of Civil Appeals stated that it was of the opinion that a conclusion that the ordinances were wholly void

was necessarily implied from the provisions of the judgment of the trial court. Therefore they had no objection to modifying the judgment so as to include the express words. We have previously quoted their exact language in this respect. (See page 5 of this brief.)

There was no fraud or collusion involved in these proceedings whatsoever. Petitioners charged that the judgments in the Court of Civil Appeals in Causes Nos. 11,619 and 11,620 were the result of collusion, but collusion necessarily involves the idea of a secret agreement for a wrongful purpose, or a secret arrangement between persons to defraud another, or to obtain an unlawful object through legal proceedings. No facts are pointed out by petitioners which would in any way tend to show any fraud or collusion in this matter. On the contrary, the record affirmatively shows that the entire matter was handled openly and in accordance with customary and sound legal practice.

II.

That said ordinances which attempted to annex Olmos Park and Terrell Hills were in fact void. That this was apparent from the evidence and the findings of the trial court in this case and such void ordinances were subject to collateral attack. (p.6)

The record shows that upon the trial of the present case, it was proved, and the trial judge found, that the City of Terrell Hills and the City of Olmos Park were each, at the time of their attempted annexation by the City of San Antonio, a duly incorporated city or town of less than 5,000 inhabitants; that each had a duly elected, qualified and acting mayor, and that neither of said cities had in any way consented to be annexed by the City of San Antonio, but had at all times and were still resisting said attempted annexation and that at the time of the trial of this suit, legal proceedings

had been instituted by each of said towns to declare said annexation ordinances invalid and said legal proceedings were pending at the time of the trial of this suit.

The last Federal Census shows the City of San Antonio to be a city of more than 250,000 population. The attempts of one incorporated city to annex the territory of another incorporated city has been the source of considerable litigation in the State of Texas, and the courts of this state have held, and it is now the settled law of this state, that the only authority in the law of this state authorizing one municipal corporation to annex another municipal corporation, is Article 1265 R.C.S., 1925, Texas. *Town of Griffin Park* v. *City of Port Arthur*, 36 *S. W.* (2) 593 (*loc. cit.* 595)

Article 1265 applies only to cities and towns with a population of 100,000 or more and not over 150,000 according to the last Federal Census. The attempt made by the City of San Antonio to annex Terrell Hills and Olmos Park was by simple ordinance only and was not an attempt to comply with Article 1265, or any other provision of the Constitution and Laws of the State of Texas. Under the Charter of the City of San Antonio, unincorporated territory could be annexed by simple ordinance, but there is no provision under the Constitution and Laws of the State of Texas by which the City of San Antonio could annex the territory of another duly incorporated city or town by simple ordinance or otherwise, without the consent of said other incorporated city or town. *Hunt* v. *Atkinson*, 12 S. W. (2) 412; *City of Galvan Park* v. *City of Houston*, 113 S. W. (2) 162; *City of Houston* v. *City of Magnolia Park*, 276 S. W. 685.

III.

That the City of San Antonio, through its officers and attorneys, had the right and authority to confess error and

abandon its appeal in said quo warranto suits (Nos. 11,619 and 11,620). (p. 7 this brief)

The City of San Antonio had the full legal and moral right to abandon its appeal of the quo warranto suits and to admit that the trial court had reached the correct result in such litigation. From petitioners' argument, it can be implied that their position is that when a Municipal corporation once gets into litigation, that it is powerless to bring it to a close until it has obtained a judgment from the court of last resort having jurisdiction of the cause, after contesting the matter at every step. This would be an absurdity. There is no justification for a municipality to continue expensive litigation after it has determined that such litigation cannot be won. For that reason, it is universally held that a municipal corporation can bind itself by a judgment by confession, or by agreement. The limitations upon a city's authority to agree to a consent judgment are equally well settled. A municipality may consent to or confess a judgment against itself in the absence of fraud or collusion if the obligation assumed by the municipality is just and one which by law its officers have a right to assume on behalf of the municipality. *Hector Coolseat* v. *City of Veblin, Sup. Ct. So. Dakota,* 226 N. W. 726, 67 A.L.R. 1499; *Clark* v. *W. L. Pearson & Co.*, Tex. C.C.A., 26 S. W. (2) 382; *Sweet* v. *Denver & R. G. RR Co.* 59 Colo. 131, 147 Pac. 669; *Chaffee* v. *Granger,* 6 Mich. 51; *Salt Lake City* v. *Salt Lake Investment Co.,* 43 Utah, 181, 134 Pac. 607.

In the last cited case, the Court said:

> "Municipal corporations are bound by the acts of their attorneys precisely the same as private corporations or individuals would be. In the absence of fraud or collusion on their part, attorneys have power to bind their clients, including municipal corporations, by consenting to judgments or decrees."

And in Sweet v. Denver & R. G. RR Co., supra, the Supreme Court of Colorado said:

> "We have yet to learn that there is any iniquity in consenting to a judgment upon just and valid obligations, whether by an individual on his own account, or by a managing board on account of a municipality."

Of course, the judgments in Causes Nos. 11,619 and 11,620 complained of by petitioners, did not in any manner create any obligation against the City of San Antonio. Neither did it impose any obligation or cast any burden on petitioners. The cases cited by petitioners in their brief, such as Kelley v. Town of Milan, 127 U. S. 139, 32 L. ed. 77, 8. S. St. 1101, have no application whatever to the situation such as we have here. In that case, the Town of Milan had issued negotiable bonds to be used in payment of stock in a railroad company. The town had no authority under the laws of the State of Tennessee to issue such bonds. Consequently, the Mayor and Aldermen had no authority to enter a consent decree against the city holding said bonds to be valid and enforcible. If the City had no authority under the law to execute and negotiate such bonds by its regular municipal machinery, it could not accomplish the same result by consenting to a judicial decree to that effect. The other authorities cited in petitioners' brief with reference to the agreed judgments which held general laws to be unconstitutional, of course, have no application to the present suit whatsoever. No general law was held unconstitutional by the Court of Civil Appeals in the quo warranto cases. There is no finding that the so-called annexation ordinances were unconstitutional. They were merely declared to be void and therefore not accomplishing the annexation of Olmos Park and Terrell Hills to San Antonio, or in giving even color of legality to such attempted annexation.

Petitioners make no attempt to point out any action or

omission on the part of the governing authorities of the City of San Antonio with reference to said two quo warranto suits which would constitute a fraud upon petitioners, or any other citizens of said city. They charge that the judgments in the quo warranto suits were obtained by collusion, but no fact is shown which would show collusion. Collusion has been judicially defined many times and its most common judicial definition is that collusion means an agreement to defraud a person of his rights by forms of law, or to obtain an object forbidden by law. *Carpenters Will*, 40 N.Y.S. (2) 13, (loc. cit. 17); *Colegrove* v. *John Hancock Mutual Life Ins. Co.* (Mo.) 153 S. W. (2) 750 (loc. cit. 752); *City of Fayetteville* v. *Parrish*, 110 Fed. (2) 902 (loc. cit. 908)

Petitioners were not residents of the territory involved in the annexation ordinances. They do not show that they owned any property in such territory and under the record here before the Court, their rights and interests in such matter of the two quo warranto suits were no different from the rights and interests of every other citizen and taxpayer of the City of San Antonio. They had no peculiar right in having attempted annexation of this territory sustained and they were not threatened with some damage peculiar to themselves by the failure of such annexation proceedings. Therefore, petitioners were not in a position to demand that they be heard on the appeal of the annexation quo warranto suits and they had no right to demand the continuation of the appeal, and they were denied no due process of law by the confession of error on the part of the City of San Antonio.

It is a well established principle of law in this State that no action lies in favor of an individual to restrain an interference with a mere public right and such suits cannot be maintained by an individual who has not suffered or is not threatened with some damage peculiar to himself. *City of San Antonio* v. *Strumberg*, 70 Tex. 366, 7 S.W. 754.

Justice Gaines, in the opinion in the case just cited, says that

> "individuals have a right to sue for a redress of their own private injuries, but for such as affect all the public alike, an individual is not the representative of the public interest."

We have searched diligently through the long petition for certiorari and brief in support of the same, filed by the petitioners herein, and we have not been able to find even an assertion that the ordinances which attempted to annex Olmos Park and Terrell Hills to the City of San Antonio were in fact valid. It is not even contended that they were merely voidable only. Unless Petitioners could show here that the judgment and opinion of the Court of Civil Appeals holding that these ordinances were void was contrary to law, then no showing has been made that any right petitioners have has in any way been invaded or that they are entitled to any sort of judgment other than that which has been rendered herein by the Court of Civil Appeals after full hearing, and which has been given the approval of the Supreme Court of Texas by its adverse action upon petitioners' application for writ of error.

IV.

The validity of the election of September 25, 1945, was properly upheld regardless of whether or not the annexation ordinances were void. (p. 7, this brief)

The trial court, in the present case, made proper findings supported by adequate testimony to sustain the election without expressing the legal conclusion that the said annexation ordinances were void.

The trial court, because of the pendency of the quo warranto suits, did not deem it necessary to determine the issues which were involved in the quo warranto suits. However,

when the case was decided in the Court of Civil Appeals, that Court, in view of the unquestionable invalidity of the annexation ordinances, did not find it necessary to discuss the other findings and conclusions of the trial court which would compel the affirmance of the judgment of the Court below. The Supreme Court of Texas denied petitioners' application for writ of error because the same was without merit.

The trial Court, found that there was no evidence showing that any of the persons referred to in petitioners' pleading actually resided in the respective cities on the date of the election, or were at that time otherwise qualified to vote in said election. (Finding 18, R. 22)

The trial court found that while no machinery was provided for elections in said cities, there was no evidence of any request to hold such election in said cities and no evidence that any one offered to or would have voted in said election in said cities, and no evidence that any one was denied the right to vote therein, or any attempt made to hold an election in said cities. (Finding 19, R. 22).

That the City of San Antonio had never assessed for taxation any property situated in the territory of Olmos Park or Terrell Hills and could not in any event do so prior to June 1, 1946. (Finding 20, R. 22-23)

The trial court concluded as a matter of law that the inhabitants of the cities of Terrell Hills and Olmos Park were not qualified electors in the Special Municipal election held on September 25, 1945. (Conclusion of Law 6, R. 24) That as a matter of law, without regard to the merits of the attack upon the validity of the annexation ordinances of July 25, 1945, attempting to annex the cities of Terrell Hills and Olmos Park in no event would the inhabitants of such cities be eligible to vote in the election of September 25, 1945, because, among other reasons, they had not resided within the corporate limits of the City of San Antonio for six months

immediately preceding said election. *State ex rel Davis* v. *Huggins* (Sup. Ct. Okla.), 230 Pac. 716; *Seals* v. *State ex rel Matthews* (Sup. Ct. Ala.) 51 So. 337.

CONCLUSION AND PRAYER

This was an election contest and the burden was on the petitioners to show that the results of the election as declared by the proper election authorities were invalid. This they wholly failed to do. The judgments of the trial court and the Court of Civil Appeals are in all things correct and proper. The Petitioners have wholly failed to show that their rights were in any way invaded by the action of the Texas Courts and they have wholly failed to show that there is any federal question presented by this record.

Respondent calls to the attention of this Court that this litigation is delaying the commencement of a substantial program of public works in which the public has considerable interest. That if this delay continues much longer, the City of San Antonio will lose the use of large sums of money allocated to it in aid of such public works by the State and Federal Governments. That because of this situation, the respondent respectfully requests an early disposition of this application.

WHEREFORE, respondent prays that the petition for writ of certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, be in all things denied.

Respectfully submitted,

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